SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 57

W. E. HOWARD, JR., PETITIONER,

vs.

KENNETH T. LYONS AND JOSEPH S. McATEER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 **Appendix to Appellants' Brief**

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

I, JOHN A. CANAVAN, Clerk of the United States District Court, District of Massachusetts, do hereby certify that the following entries are on the CIVIL ACTION DOCKET, in the cause entitled:

Civil Action No. 56-768-M

KENNETH T. LYONS

and

JOSEPH S. McATEER

v.

W. E. HOWARD, JR.

Docket Entries

1956

Sept.	4	Complaint for Libel, filed. Summons issued.
	10	Marshal's return of sums, with service Sept. 4, 1956, filed. (On USA and of deft. Howard at Navy Yard).
Nov.	2	Defendant's answer filed.

1957

Mar.	13	Appearance of William H. Taylor, Jr. for plffs, filed.
Apr.	2	Motion for summary judgment filed.
	15	McCARTHY, J. After hearing upon motion for summary judgment, motion taken under advisement.
May	8	McCARTHY, J. Memorandum on motion for summary judgment, filed. Motion of the deft, for summary judgment under Rule 56 is granted. Judgment shall enter for the deft. Copies to counsel.
	10	McCARTHY, J. JUDGMENT entered. In accordance with a memorandum of the Court dated May 8, 1957 on deft's motion for summary judgment it is ORDERED motion of the defendant for summary

judgment under Rule 56 allowed. FURTHER ORDERED judgmeent for the defendant, action dismissed. Copies to counsel.

2 1957

10 Bonds on appeal filed by plaintiffs Joseph S. McAteer, et al and Kenneth T. Lyons, et al each for $250.00. Massachusetts Bonding and Insurance Company as surety.

10 Notice of Appeal filed by the Plaintiffs, Kenneth T. Lyons and Joseph S. McAteer, under Rule 73 (B).

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the aforesaid Court at Boston, this 8th day of July 1957.

JOHN A. CANAVAN
Clerk
By: (s) DOROTHY C. CLARK
Deputy Clerk

IN UNITED STATES DISTRICT COURT

Complaint for Libel—Filed September 4, 1956

1. The plaintiff, Kenneth T. Lyons, is a citizen of the Commonwealth of Massachusetts, resides in Watertown in said Commonwealth, and is the National Commander of the Federal Employees Veterans Association, Inc., an existing corporation duly organized under the laws of the State of Delaware. The plaintiff, Joseph S. McAteer, is a citizen of the Commonwealth of Massachusetts, resides in Somerville in said Commonwealth, is an employee of the Boston Naval Shipyard in said Commonwealth and is the Commander of the Boston Naval Shipyard Post No. 1 of the said Federal Employees Veterans Association. The defendant is a citizen of the State of Maryland and is the Commanding Officer of the Boston Naval Shipyard

3 under the jurisdiction of the Secretary of the Navy.

The amount involved in this action, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00) with respect to each plaintiff.

2. The plaintiffs allege that on September 8, 1955, the said defendant, W. E. Howard, Jr., composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed the libel hereinafter set forth, a true copy of which is hereto attached and marked Exhibit "A" and which is incorporated herein as fully as if set forth at length herein.

3. The plaintiffs further allege that while the said memorandum attached hereto as Exhibit "A" purports upon its face to be an official memorandum to be directed to the Chief of the Bureau of Ships, at Washington, D. C. and to the Chief of Industrial Relations, Office of Industrial Relations at Washington, D. C., the said defendant, W. E. Howard, Jr., outside of his official duties, on the date of the said memorandum Exhibit "A", duly released true copies of the said memorandum to the United Press, the Associated Press, the International News Service, all of the daily newspapers in the City of Boston, Massachusetts, and to all of the members of the Congressional Delegation from the State of Massachusetts serving in the Congress of the United States, and in so doing departed from his official duties, and acted solely in a personal capacity, and beyond his official duties.

4. The plaintiffs further allege that the said defendant well knowing the premises, but contriving and intending to injure the plaintiffs and to deprive them of the respect, confidence and esteem of the members of the Federal Employees Veterans Association and of the public, and their fellow employees, and contriving to deprive each of the plaintiffs of his good name and to hold each of the plaintiffs in public scorn and contempt, ridicule and disgrace,
4 did on the 8th day of September, 1955, maliciously, wilfully, wickedly, recklessly and falsely and with malice aforesight charge that the conduct of each of the plaintiffs in protecting the rights of the members of the Federal Employees Veterans Association in governmental employment amounted to overt subversion, meaning and intending to mean that each of the plaintiffs was an enemy of the United States, and in truth and fact charged and meaning to charge that each of the plaintiffs was in effect a traitor to his country, and that the foregoing was accom-

plished by use of the following words obtained in memorandum Exhibit "A".

"They wonder why a management, which must be considered sound since the Navy Department condones its existence, continues to permit a condition which amounts to overt subversion to exist, operate, and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely. Then, again the Federal Employees Veterans Association does not restrict the publicizing of its activities or of its statements, allegations, innuendoes, and indictments to shipyard employees. By design they are placed on city desks of newspapers, are sent to Members of Congress, and released to any source where it might be expected that a spark of interest could be ignited. The end result is that a continuing array of charges, unsubstantiated to be sure, but charges nevertheless, are being distributed within and without the shipyard by a group which enjoys the incongruous privilege of official recognition along with responsible organizations—a recognition accorded by the very target of their vitriolic propaganda."

5 5. The plaintiffs further allege that in the said memorandum Exhibit "A" the said defendant maliciously, wickedly, recklessly, wilfully and falsely made the following statements:

"It is considered that this observation bears out the shipyard's opinion that management is castigated only because it is management—not because of sound, valid and honest exceptions taken as a result of administrative actions. In these releases facts are distorted, if they appear at all, rumors are planted, and general employee unrest is stimulated. Enclosure (9), in particular, resulted in what was essentially a deep-reaching investigation; although it was officially designated an "examination into the facts," directed by the Chief, Bureau of Ships, to allay uncertainty and suspicions imbedded in the minds of the Massachusetts

Congressional Delegation as to the integrity and professional competence of the Commander, Boston Naval Shipyard, and certain members of his staff. The fact that the "examination," a lengthy and expensive procedure, resulted in the concurrence by the Chief, Bureau of Ships, of the report of findings that, "there has been nothing illegal or improper in the administration or actions of the Shipyard Commander" does not discount the fact that the productive loss in the Shipyard during and for sometime after the examination, due to the apprehension such an investigative procedure naturally engenders in each and every employee's mind, although not calculable, was substantial."

"In view of the experience noted by the Shipyard Commander during his relatively short tenure to date at the shipyard, coupled with the record of activity to which the immediate predecessor Shipyard Commander was exposed and likewise involved during his
6 tenure, the shipyard feels that action of an arbitrary nature regarding shipyard relations with the Federal Employees Veterans Association has reached a point of necessity. The shipyard therefore is informing Shipyard Post No. 1, for reasons which will be specified as inimical to the general well being of the shipyard, both employees and management, that on 9 September 1955 recognition of Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard will be withdrawn."

6. The plaintiffs further allege that the said defendant in writing, composing, publishing, and circulating the whole of the said memorandum marked Exhibit "A" meant, and intended to mean and convey to the members of the Federal Employees Veterans Association in the Boston area and throughout the United States and continental possessions of the United States, wherever the said Organization had members, and meant and intended to mean and convey to the public and to the fellow employees of the plaintiffs that the plaintiffs as officers of the said Organization and as individuals were engaged in subversive activi-

ties, contrary to the interests of their government, and that the said memorandum was published and circulated to hurt, injure and prejudice the character and reputation of the said plaintiffs, both as officers of the said Organization and as individuals, and to expose each of them to hatred, contempt and ridicule.

7. The plaintiffs further allege that the entire memorandum, Exhibit "A", as a whole was maliciously, wickedly, recklessly, wilfully and falsely written as a memorandum to the officials to whom it was addressed, but that the prime purpose of the said memorandum was not that it should become a part of the official records of the Navy Department, but that it was written for the sole and
7 exclusive purpose, under color of official duty, for release to the Press of America, and to members of the Congressional Delegation from the Commonwealth of Massachusetts, and to the public generally, as hereinbefore alleged, and that the address of the memorandum to the officials named therein was a pure subterfuge in an endeavor to draw around the defendant the cloak of immunity for the libelous statements contained therein.

8. The plaintiffs further allege that the defendant maliciously, wickedly, recklessly, wilfully and falsely made the following statements in the said Exhibit "A", that the shipyard employees referred to in the said statements are the plaintiffs, Kenneth T. Lyons and Joseph S. McAteer, that in composing, writing, circulating, distributing and causing to be composed, written, published, circulated and distributed the following statements, the said defendant meant and intended to mean that each of the plaintiffs was false to the trust reposed in him as an officer of the said Organization and that each of the plaintiffs was guilty of a breach of duty to the membership of the Organization, and that the defendant, by the said statements, sought to discredit each of the plaintiffs in his attempt to carry out his duties as an officer of the said Organization. That by the following statements, said defendant meant and intended to mean that each of the plaintiffs was obstructing and thwarting, not only the legitimate purposes of the Federal Employees Veterans Association, but was obstructing and thwarting the Boston Naval Shipyard in carrying

out its functions, and since the shipyard is a Naval installation engaged in the production and maintenance of ships vital to the National Defense, such obstruction and thwarting were activities treasonable with respect to the United States, and the defendant charged that the plaintiffs were in effect guilty of treason against the Government of the United States:

8 "An objective, unbiased appraisal of the contents develops the deduction that any purposes served by the publication of such material are inconsistent with the purposes cited in the Association's Constitution and By-Laws as set forth in paragraph 2 above. Such an appraisal likewise reveals that the Federal Employees Veterans Association, Post No. 1, has as a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans Association who, coincidentally, are shipyard employees, and at least one of whom is a supervisor and therefore a member of shipyard management."

9. The plaintiffs further allege that they are honorably discharged veterans of the armed services of the United States, that they are loyal citizens of the United States and that they are not members of any organization or political party whose interests are adverse to the interests of the United States.

10. The plaintiffs further allege that the publication of the libelous statements as contained in Exhibit "A" and heretofore referred to, has injured the reputation of each of the plaintiffs, both individually and as officers of the Federal Employees Veterans Association, that because of the reckless, malicious and wicked manner in which the said libelous statements of the defendant were written, published and circulated, each of the plaintiffs is entitled to have and recover from the defendant compensatory damages.

11. Trial by jury is demanded in this action.

WHEREFORE, each of the plaintiffs prays for judgment against the said defendant in the amount of Five Hundred Thousand Dollars ($500,000.00) as compensatory damages besides the cost of this action.

(s) IRVING KAPLAN
11 Beacon Street
Boston, Massachusetts.
Attorney for the Plaintiffs

Exhibit "A"

BOSTON NAVAL SHIPYARD

8 September 1955

From: Commander, Boston Naval Shipyard
To: Chief, Bureau of Ships
Department of the Navy
Washington 25, D. C.
Chief of Industrial Relations
Office of Industrial Relations
Department of the Navy
Washington 25, D. C.
Subj: Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc.; notification of action withdrawing official shipyard recognition to
Ref: (a) NCPI 60
Encl. (1) COMNAVSHIPYD BSN 1tr (100) P8-1 to BNS Post No. 1, FEVA, Inc., to be released on 9 Sep 1955 (copy)
(2) COMNAVSHIPYD BSN 1tr (100) P8-1 of 8 Sep 1955 to Hon. John W. McCormack, M.C. (copy)
(3) BNS Post No. 1, FEVA, INC. Publication dated Aug 1955 (copy)
(4) BNS Post No. 1, FEVA, INC. Publication dated Jun 1955 (copy)
(5) BNS Post No. 1, FEVA, INC. Publication dated Apr 1955 (copy)
(6) BNS Post No. 1, FEVA, INC. Publication dated Mar 1955 (copy)
(7) BNS Post No. 1, FEVA, INC. Publication dated Feb 1955 (copy)

(8) Bns Post No. 1, Feva, Inc Publication dated Jan 1955 (copy)
(9) Bns Post No. 1, Feva, Inc. Publication released Dec 1954 (copy)

1. The records in this shipyard indicate the Federal Employees Veterans Association was organized in 1946. Although the scope of the organization's activities originally may have been envisioned to include an eventual expansion involving potential membership of federally employed veterans throughout the United States, it appears that the group formed in the Boston Naval Shipyard in 1946 was the parent organization of what is now known as the Federal Employees Veterans Association, Inc.; and that the original Boston Naval Shipyard group later became separately identified as Boston Naval Shipyard Post No. 1. The first record of a meeting of the Federal Employees Veterans Association with the Shipyard Commander appears to be on 6 July 1949. No record is available which reveals a written request for official shipyard recognition; but since Navy Civilian Personnel Instructions permit that such a representation may be made orally, it may reasonably be assumed that such request was made and that approval was granted in a like manner. This conclusion is borne out by (1) the first meeting of record noted above, and (2) by an "Employee Organization Information" form on file dated 19 August 1949 in which certain organizational information was sought from these shipyard organized groups to which official recognition had been accorded. The first roster of officers of the Boston Naval Shipyard group, submitted 16 February 1948, indicates that Mr. Kenneth T. Lyons, Leadingman, Welder, was listed as Adjutant. Subsequently, on 6 July 1949, the Shipyard Commander was informed, at the meeting
11 noted above, that Mr. Lyons had been elected Commander. This information is cited to indicate that Mr. Lyons, a supervisory employee at this shipyard, went on to become the Commander of the national organization of the Federal Employees Veterans Association upon its establishment and, as far as the shipyard's records indicate, has continued in such capacity up to the present time. Although the shipyard is directly concerned only with the

Federal Employees Veterans Association, Boston Naval Shipyard Post No. 1, it is, notwithstanding, significant to note that Mr. Lyons and one other shipyard employee are National Commander and National Adjutant respectively of the national organization, and from a continuing close-hand observation exercise a predominant influence in all the Federal Employees Veterans Association's activities.

2. The "purpose" of the Federal Employees Veterans Association quoted directly from the copy of the Association's "Constitution and By-Laws" on file in the shipyard is as follows:

> "The purpose of this Association shall be to bring together at frequent intervals those ex-servicemen and women who have served on active duty in any branch of the Armed Forces of the United States and have been separated therefrom under honorable conditions and who are now employed by the United States Federal Government directly or indirectly, those who are interested in defending Veteran Preference Rights, in the betterment of general conditions and the welfare and the protection of rights of the veteran for ourselves and posterity, while in the employment of the Federal Government."

3. There is no question that in furtherance of its stated purpose the Federal Employees Veterans Association has been active, alert, and militant in its desire to preserve and acquire rights, benefits, and privileges to veterans
12 employed by the federal government. It is a matter of public record that the Association's activity in this respect ranges from the providing of personal representation at grievance and disciplinary hearings at local levels to sponsorship of civil action in U. S. District Courts and U. S. Courts of Appeal. It is not within the province of the shipyard to evaluate the significance of this latter type of activity since it constitutes, in effect, claims against the United States in which this shipyard as well as other government agencies are, on occasion, involved.

4. Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc., issues to its members on an approximate monthly basis what may be termed a "news-

letter" and which contains information purportedly of interest. The masthead of the publication clearly identifies "Boston Naval Shipyard Post No. 1." Also contained on the masthead is a roster of officers of Post No. 1, all of whom are employees, both supervisory and non-supervisory, of the shipyard. This publication is not submitted for approval for posting on unofficial bulletin boards because the nature of its contents would preclude such approval. However, there is no doubt that the bulletin gets wide circulation within the shipyard and outside as well. The nature of the bulletin content has, for the past two years, become increasingly defamatory of shipyard administration and has revealed a destructively critical attitude toward shipyard, Navy Department, and Department of Defense policy and people. Many of the statements, observations, and opinions contained in the bulletin referring to, or directed at, military personnel border closely upon, if they are not actually, libel. An objective, unbiased appraisal of the contents develops the deduction that any purposes served by the publication of such material are inconsistent with the purposes cited in the Association's Constitution and By-Laws as set forth in paragraph 2 above.

13. Such an appraisal likewise reveals that the Federal Employees Veterans Association, Post No. 1, has as a prime purpose the use of this publicity medium not alone to thwart the aims of shipyard administration in the accomplishment of its mission, but to further personal aims and self interests of those guiding hands of the Federal Employees Veterans Association who, coincidentally, are shipyard employees, and at least one of whom is a supervisor and therefore a member of shipyard management.

5. The shipyard provides for the Federal Employees Veterans Association, even as it does for any and all other recognized employee groups, readily accessible and well publicized means by which the groups may meet with any level of shipyard management. Many of the groups, including the Federal Employees Veterans Association, avail themselves of this policy. Save for those meetings with the Federal Employees Veterans Association, such meetings, in which viewpoints are exchanged, recommendations considered, and questions involving policy or work situations are discussed, are both constructive and productive. Meet-

ings with the Federal Employees Veterans Association are seldom productive because of the Association's abiding attitude to magnify trivialities and to point a finger of scorn at personalities within and beyond the shipyard so long as they are individuals duly charged with a management responsibility or fulfilling a given mission.

6. The shipyard does not propose to analyze the motives underlying the conditions discussed herein. However, it is felt that the results of such conditions of which the shipyard has factual knowledge should be noted. In the first place, employees as a whole sense a feeling of bewilderment. They wonder why a management, which must be considered sound since the Navy Department condones its existence, continues to permit a condition which amounts to overt subversion to exist, operate, and even to thrive among a relatively small but nevertheless readily identifiable group of shipyard employees. They recognize a weakness either in management or in the system by which management must perforce be guided. General morale is affected, and obviously, adversely. Then again the Federal Employees Veterans Association does not restrict the publicizing of its activities or of its statements, allegations, innuendoes, and indictments to shipyard employees. By design they are placed on city desks of newspapers, are sent to Members of Congress, and released to any source where it might be expected that a spark of interest could be ignited. The end result is that a continuing array of charges, unsubstantiated to be sure, but charges nevertheless, are being distributed within and without the shipyard by a group which enjoys the incongruous privilege of official recognition along with responsible organizations—a recognition accorded by the very target of their vitriolic propaganda.

7. Reference (a) contains the Navy's policy governing Employee (Group) Relations. The shipyard considers this policy generally sound and that it has been so proven over the years of its existence. Employee groups on the whole have embraced this policy; and by their active, sincere, and constructive efforts within its framework, wholesome relations with the shipyard have developed to the end that operating policies are understood and general employee

morale has been strengthened. However, the shipyard likewise believes that the Navy's Employee (Group) Relations policy, effective as it is in its present form, falls somewhat short of being entirely complete. In recognizing an employee group, the only essential prohibition imposed on the Shipyard Commander is the granting of recognition to an organization associated in any way with any group cited by the Attorney General in his list of subversive organizations. Having determined upon this fact, the Shipyard Commander must, therefore, "recognize" any group desiring to provide employee representation. From this point on reference (a) makes no provision for the cancellation or withdrawal of recognition if, in the opinion of the Shipyard Commander or of higher authority, circumstances have arisen which might warrant such action.

8. The shipyard believes that it has an obligation in pursuance of an equitable Employee (Group) Relations program to accord to those recognized employee groups who demonstrate a sincerity of effort, and who perform an admittedly important function in the contemporary labor-management relations concept, some measure of protection in the public eye and in the employee eye from any group whose methods and whose motives are unethical, uninhibited, and lack the integrity of purpose that could reasonably be expected. Under the present policy outlined in reference (a) it is believed that specified means of discharging such an obligation are lacking.

9. Enclosures (3) through (9) are examples of a trend which the shipyard considers serious and by which the Federal Employees Veterans Association, Post No. 1, emits its editorial expletives directed not only at the shipyard but at Bureau of Ships and Secretarial levels as well as to the President of the United States. It is significant to note, in a review of the enclosures, the consistent pattern of the approach. Although a change of shipyard command occurred during the period covered by the seven publications no perceptible variance of the critical tenor is at all apparent. It is considered that this observation bears out the shipyard's opinion that management is castigated only because it is management—not because of sound, valid, and honest exceptions taken as a result of

administrative actions. In these releases facts are distorted, if they appear at all, rumors are planted, and general employee unrest is stimulated. Enclosure (9), in
16 particular, resulted in what was essentially a deep-reaching investigation, although it was officially designated an "examination into the facts," directed by the Chief, Bureau of Ships, to allay uncertainty and suspicions imbedded in the minds of the Massachusetts Congressional Delegation as to the integrity and professional competence of the Commander, Boston Naval Shipyard, and certain members of his staff. The fact that the "examination," a lengthy and expensive procedure, resulted in the concurrence by the Chief, Bureau of Ships, of the report of findings that, "there has been nothing illegal or improper in the administration or actions of the Shipyard Commander" does not discount the fact that the productive loss in the shipyard during and for sometime after the examination, due to the apprehension such an investigative procedure naturally engenders in each and every employee's mind, although not calculable, was substantial.

10. In view of the experience noted by the Shipyard Commander during his relatively short tenure to date at the shipyard, coupled with the record of activity to which the immediate predecessor Shipyard Commander was exposed and likewise involved during his tenure, the shipyard feels that action of an arbitrary nature regarding shipyard relations with the Federal Employees Veterans Association has reached a point of necessity. The shipyard therefore is informing the Federal Employees Veterans Association, Boston Naval Shipyard Post No. 1, for reasons which will be specified as inimical to the general well being of the shipyard, both employees and management, that on 9 September 1955 recognition of Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard will be withdrawn. In issuing this notice the shipyard does not propose to make provision for "show cause" hearings prior to the action or for any further appeal at the shipyard level.
17 The shipyard considers this latter determination valid and not susceptible to legal redress. Insofar as "recognition" of an employee group in no way appears to be a statutory right, but rather a purely administrative

privilege, it is further considered that the authority for the withdrawal of "recognition" is a logical and necessary corollary to the authority for granting. As both Bureau of Ships and the Office of Industrial Relations are aware, the action proposed above is neither impetuous nor is being taken without full cognizance of the implications. The shipyard, however, is ready to stand firm on the equitableness of its action as being the only alternative available to correct a distressing situation which has already cut deep inroads in the effectiveness of the necessary employee (group) relations.

11. By the foregoing, the Office of Industrial Relations and the Bureau of Ships, are herewith advised of the action cited above. The shipyard recognizes that the action being taken is a local command administrative decision. However, because of the significance of the situation which may well have more than local aspects, the shipyard desires that the addresses be informed of the measure the shipyard is taking to meet a problem which has become increasingly complex over an extended period of time and which, in the shipyard's opinion, must be squarely met by the action outlined.

12. Enclosure (1) is a copy of the letter of notification to the Boston Naval Shipyard Post No. 1, Federal Employees Veterans Association, Inc., which will be presented on 9 September 1955, and enclosure (2) is a copy of the letter sent this date to Honorable John W. McCormack, M. C., and is one of similar letters sent to all members of the Massachusetts Congressional Delegation.

W. E. HOWARD, JR.

Copy to:
COMONE w/encls

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18 IN UNITED STATES DISTRICT COURT

Defendant's Answer—Filed November 2, 1956

Now comes Admiral William E. Howard, Jr., acting by his attorney, Anthony Julian, United States Attorney for the District of Massachusetts, and for answer says:

FIRST DEFENSE

1. Defendant is without sufficient information to form a belief as to the truth of the allegation that the plaintiff Kenneth T. Lyons is a citizen of the Commonwealth of Massachusetts, resides in Watertown in said Commonwealth and is the National Commander of the Federal Employees Veterans Association, Inc., an existing corporation duly organized under the laws of the State of Delaware. The defendant is without sufficient information to form a belief as to the truth of the allegation that the plaintiff Joseph S. McAteer is a citizen of the Commonwealth of Massachusetts, resides in Somerville in said Commonwealth, and is the Commander of the Boston Naval Shipyard Post No. 1 of the said Federal Employees Veterans, and the defendant denies that said Joseph S. McAteer is an employee of the Boston Naval Shipyard in said Commonwealth. The defendant admits that he is a citizen of the State of Maryland and is the Commander of the Boston Naval Shipyard under the jurisdiction of the Secretary of the Navy. Defendant denies that the amount involved in this action exceeds the sum of Three Thousand Dollars ($3000.00) with respect to each plaintiff.

2. The defendant denies that on September 8, 1955 he composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed any libel or libelous writing. The defendant denies that he composed, wrote, published, circulated, distributed, and caused to be composed, written, published, circulated and distributed the document marked Exhibit A to plaintiffs' complaint, and defendant denies that
19 the document attached to plaintiffs' complaint and marked Exhibit A is a true copy of the official report of the defendant to his superior officers in the Department of the Navy, which report was made by defendant in the course of his official duties. And further answering, defendant denies that said Exhibit A is a true copy of any document composed, written, or caused to be composed or written by the defendant.

3. Defendant says that his official report which is inaccurately represented by Exhibit A to plaintiffs' complaint was and is in fact an official letter from defendant

to the Chief, Bureau of Ships, Department of Navy, and to the Chief of Industrial Relations, Office of Industrial Relations, Department of Navy, Washington, D. C. Defendant denies that outside of his official duties he duly released two copies of his official letter to the United Press, the Associated Press, the International News Service, and to all the daily newspapers in the City of Boston, Massachusetts. Defendant denies that in any respect he departed from his official duties in reference to sending his official letter to the Chief, Bureau of Ships, and the Chief of Industrial Relations, and denies that he acted solely in a personal capacity beyond his official duties in connection with said official letter, and defendant admits that he caused to be sent to interested members of the Massachusetts Congressional Delegation copies of his official letter to the Chief, Bureau of Ships, and defendant says that in so sending copies to the interested members of the Massachusetts Congressional delegation he was acting within the scope of his official duties and pursuant to the Department of Navy policy. And defendant denies any other factual allegation in the third paragraph of plaintiffs' complaint not otherwise specifically denied.

4. Defendant denies each and every allegation of fact in the fourth paragraph of plaintiffs' complaint.

5. Defendant admits that the language quoted in the fifth paragraph of plaintiffs' complaint is a portion of his official report to the Chief Bureau of Ships, but denies that the quoted language or any other portion of his official report was written maliciously, wickedly, recklessly, wilfully and falsely.

6. Defendant denies each and every allegation of fact in the sixth paragraph of plaintiffs' complaint.

7. Defendant denies each and every allegation of fact in the seventh paragraph of plaintiffs' complaint. And further answering said seventh paragraph, the defendant says that said official letter was an official report written to his superiors by the defendant in the course of his official duties.

8. Defendant admits that the quoted language is a portion of his official report to his superiors in the Bureau

of Ships but defendant denies each and every other allegation of fact contained in the eighth paragraph of plaintiffs' complaint.

9. Defendant is without sufficient information to form a belief as to the truth of the allegation contained in the ninth paragraph of plaintiffs' complaint.

10. The defendant denies that the statements contained in Exhibit A to plaintiffs' complaint were or are libelous statements and defendant denies that said statements were libelous or were written, published and circulated in a reckless, malicious and wicked manner. Defendant denies that each of the plaintiffs is entitled to have and recover compensatory damages, and further answering said tenth paragraph of plaintiffs' complaint the defendant is without sufficient information to form a belief as to the truth of any other allegation of fact contained in said tenth paragraph.

21 SECOND DEFENSE

The defendant denies that the defendant made any publication of the memorandum alleged to be libelous.

THIRD DEFENSE

The defendant says that the official letter alleged to be a libel was an official report made by the defendant in the course of his official duties as Commander of the Boston Naval Shipyard to other public officers, and as such was a privileged communication.

FOURTH DEFENSE

Defendant says that if the defendant wrote or published any or all of the statements alleged in plaintiffs' complaint and said Exhibit A thereto, which defendant denies, then such statements were true in substance and in fact.

FIFTH DEFENSE

Defendant says that the words used in said official letter marked plaintiffs' Exhibit A, were a fair and accurate account of an official report of a matter affecting the public interest and that if it appeared that defendant published

same, which the defendant denies, publication thereof was privileged.

SIXTH DEFENSE

Defendant says that the words contained in his official report which is partly reproduced by plaintiffs' Exhibit A do not constitute a libel when addressed to the plaintiffs.

SEVENTH DEFENSE

Defendant says that if it appears that the defendant wrote and published the official letter marked plaintiffs' Exhibit A, which defendant denies, then the actions of the plaintiffs were such as to create a reasonable belief that the matters charged against the plaintiffs by the de-
22 fendant were true, as appears from the full and complete and true copy of the official letter in question which defendant appends hereto and marks defendant's Exhibit A.

EIGHTH DEFENSE

Defendant says that if it appears that the defendant wrote and published the official report which is partially reproduced by and marked plaintiffs' Exhibit A, which defendant denies, then the defendant was engaged in an executive function in an executive proceeding in the course of his official duties and was absolutely privileged.

By his attorney,

ANTHONY JULIAN
United States Attorney

By: (s) ANDREW A. CAFFREY
Assistant U. S. Attorney

(s) JOHN M. HARRINGTON, JR.
Assistant U. S. Attorney

IN UNITED STATES DISTRICT COURT

Motion for Summary Judgment—Filed April 2, 1957

Now comes the defendant, W. E. Howard, Jr., Rear Admiral, U. S. Navy, and moves the Court to enter summary judgment for the defendant in accordance with Rule 56(b) and (c) of the Federal Rules of Civil Procedure, on the ground that there is in this case no genuine issue of material fact. The pleadings previously filed in this action and Defendant's Affidavits A and B hereto attached show the defendant is entitled to judgment as a matter of law.

By his attorney,
ANTHONY JULIAN
United States Attorney

By: (s) ANDREW A. CAFFREY
Assistant U. S. Attorney

(s) JOHN M. HARRINGTON, JR.
Assistant U. S. Attorney

23 **Defendant's Affidavit A**

Now comes J. A. Snackenberg, Rear Admiral, United States Navy, Commandant, First Naval District, and makes oath as follows:

1. I am the Commandant, First Naval District, United States Navy. My military station is at Headquarters, First Naval District, Navy Building, 495 Summer Street, Boston, Massachusetts.

2. I exercise military command and control over W. E. Howard, Jr., Rear Admiral, United States Navy, who is the Commander, Boston Naval Shipyard. I am Rear Admiral Howard's immediate military superior and his commanding officer.

3. Rear Admiral W. E. Howard, Jr., was on active duty with the United States Navy on September 8, 1955.

4. Included among Rear Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the making of reports to the Bureau

of Ships, United States Navy, relative to any significant action taken by him with respect to the personnel, civilian or military, employed or stationed at the Boston Naval Shipyard.

5. Included among Read Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the furnishing of copies to the Massachusetts congressional delegation of his official notification to the Bureau of Ships of personnel action taken by him as Commander, Boston, Naval Shipyard.

6. Included among Rear Admiral Howard's official duties as Commander, Boston Naval Shipyard, is and was on September 8, 1955, the assuring that information concerning his command be made available to the public, and that said information be released to establish media, through official channels. During my official absence on leave, the then acting Commandant, First Naval District, Cap-
24 tain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District, to the editors of the various newspapers in Boston, Massachusetts, copies of the letter from the Commander, Boston Naval Shipyard, to the Chief, Bureau of Ships, and the Chief of Industrial Relations, Washington, D. C.; copies of the letter to the Honorable John W. McCormack; and copies of the letter to Mr. Joseph McAteer, Post No. 1 Commander, Federal Employees Veterans Association.

(s) J. A. SNACKENBERG
J. A. SNACKENBERG
Rear Admiral, U. S. Navy

Subscribed and sworn to March 28, 1957.
Before me

(s) KATHLEEN G. NEARY
Notary Public

My commission expires
March 13, 1959

Defendant's Affidavit B

Now comes the defendant, W. E. Howard, Jr., Rear Admiral, United States Navy, and makes oath as follows:

1. I am the Commander, Boston Naval Shipyard, Boston, Massachusetts, and I occupied that position in the rank of Captain, United States Navy, on September 8, 1955.

2. In the course of my official duties as Commander, Boston Naval Shipyard, I caused to be written and composed and I signed an official communication addressed jointly to the Chief, Bureau of Ships, Department of the Navy, and to the Chief of Industrial Relations, Department of the Navy, which official communication was dated September 8, 1955, and a portion of which official communication is represented by plaintiff's Exhibit A in this
25 case and the entirety of which official communication is represented by defendant's Exhibit A filed in this case.

3. In the course of my official duties as Commander, Boston Naval Shipyard, I was advised that a list of charges against the Boston Naval Shipyard Management made by the Federal Employees Veterans Association was given to every Massachusetts congressman and senator.

4. In the course of my official duties as Commander, Boston Naval Shipyard, I was advised that a report made by Rear Admiral Cowdrey on this list of charges against the Boston Naval Shipyard management by the Federal Employees Veterans Association was given to interested members of the Massachusetts congressional delegation.

5. In the course of my official duties as Commander, Boston Naval Shipyard, and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest, I sent copies of defendant's Exhibit A to the Honorable John W. McCormack and to all other members of the Massachusetts congressional delegation.

6. Pursuant to the provisions of U. S. Navy Public Information Manual NAVEXOS P-1035 I transmitted copies of defendant's Exhibit A to the Commandant, First Naval District.

7. I did not release or cause to be released any document or communication relating to defendant's Exhibit A to any representative of the press.

(s) W. E. HOWARD, JR.
W. E. HOWARD, JR.
Rear Admiral, U. S. Navy

Subscribed and sworn to 31 March, 1957.
Before me

(s) ELLIS C. JEFFREY
Notary Public

My commission expires
5/21/60

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26 IN UNITED STATES DISTRICT COURT

Memorandum on Motion for Summary Judgment—May 8, 1957

McCARTHY, *D. J.*

This case came on to be heard upon the motion by the defendant for summary judgment. The defendant asserts an absolute privilege. The contention of the defendant must be sustained.

The complaint, and the affidavits and documents referred to therein, filed in support of this motion, show conclusively that the statements attributed to the defendant were published by him in the discharge of his official duties and in relation to matters committed to him for determination.

The law is clear on the question and the following quotation from a decision by Judge Day summarizes the present state of the law:

> "It has long been established that the heads of governmental departments are immune from Civil liability for acts done by them in the exercise of their official functions. *Spalding* v. *Vilas*, 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780. The reason for this rule is one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained and often to the detriment of

public service.' *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, 178, 5 L.R.A., N.S. 163.

"The growth of our governmental activities has long since prevented the head of a department from performing the many activities and duties within its sphere. Of necessity, there must be delegation of authority. And when the act done by a subordinate official occurs in the course subject to the duty to act, it is the act of the department just as much as though performed by the head of that department. Thus the same reason for immunity from civil liability exists
27 with respect to the acts of a subordinate official done in the exercise of his or her official functions. *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135; 118 A.L.R. 1440; *Gregoire* v. *Biddle*, 2 Cir., 177 F.2d 579, Certiorari denied 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1361; *Love* v. *Snyder*, 6 Cir., 184 F.2d 840; *Taylor* v. *Glotfelty*, 6 Cir., 201 F.2d 51; *DeBusk* v. *Harvin*, 5 Cir., 212 F.2d 143.

"The plaintiff, however, contends that the defendant's acts were motivated by malice, and that the doctrine of immunity does not apply to this action. This contention is without merit. Since the acts of the defendant were done by [him] in the discharge of [his] official duties and in relation to matters committed to [him] for [his] official determination, [his] motives are immaterial. *Spalding* v. *Vilas*, supra; *Cooper* v. *O'Connor*, supra; *Gregoire* v. *Biddle*, supra; *Yaselli* v. *Goff*, 2 Cir., 12 F.2d 396, affirmed 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395. The reason for this rule is well stated in *Gregoire* v. *Biddle*, supra, 177 F.2d at page 581:

"'***Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance be-

tween the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest
28 officers than to subject those who try to do their duty to the constant dred of retaliation.***' "
Carson v. *Behlen*, 136 F. Supp. 222, 224-225.

The case of *Barr* v. *Matteo*, decided by the Court of Appeals for the District of Columbia on May 2, 1957, is distinguishable on its facts.

It is my considered judgment that the complaint and affidavits show that there is no genuine issue as to any material fact in this action, and that the complaint fails to state a claim upon which relief can be granted. Accordingly, the motion of the defendant for summary judgment under Rule 56 is hereby granted. Judgment shall be entered for the defendant.

IN UNITED STATES DISTRICT COURT

Judgment—May 10, 1957

McCarthy, *D. J.*

After hearing upon defendant's Motion for Summary Judgment and in accordance with a memorandum of the Court on defendant's Motion for Summary Judgment dated May 8, 1957, it is hereby

Ordered motion of the defendant for summary judgment under Rule 56 allowed.

Further Ordered judgment for the defendant, action dismissed.

By the Court,
(s) John B. Murray, Jr.
Deputy Clerk

(s) William T. McCarthy,
United States District Judge

29 IN UNITED STATES DISTRICT COURT

Plaintiffs' Notice of Appeal to Court of Appeals Under Rule 73(B)—Filed May 10, 1957

NOTICE IS HEREBY GIVEN that Kenneth T. Lyons and Joseph S. McAteer, plaintiffs above named, hereby appeal to the United States Court of Appeals for the First Circuit from the judgment entered for the defendant and against them on May 8, 1957, pursuant to the granting of defendant's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

KENNETH T. LYONS
JOSEPH S. MCATEER
By (s) WILLIAM H. TAYLOR, JR.
Their attorney

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31 **Appendix to Appellee's Brief**

BOSTON NAVAL SHIPYARD POST 1, FEDERAL EMPLOYEES VETERANS ASSOCIATION, INC.

Officers: Joseph McAteer, Commander; Dan Healy, Jr., Jr. Vice-Cmdr.; Al Haley, Jr. Vice Cmdr; Thomas Dezerine, Treasurer; Bert Sparkes, Adjutant; Mark Joseph, Membership; Kenneth T. Lyons, Chairman; Charles McCarthy, Andy Sullivan, Board of Trustees.

Important Meeting Friday Evening—Aug. 26, Hotel Kenmore, Boston, 8 P. M.

Delegates To Be Nominated

Post Officers for 1956 To Be Nominated and Elected at This Meeting—Be Sure To Attend!

National Convention—Sept. 30, Oct. 1 & 2 in Boston

The F. E. V. A. National Convention Will Be Held in Boston, Massachusetts, on September 30, October 1 and 2nd (Friday, Saturday and Sunday) at the Sheraton Plaza Hotel, Boston

The convention program will include a banquet on Saturday together with the F. E. V. A.'s national convention dance on Saturday evening at the main ballroom of the

Sheraton Plaza. Tickets for the banquet will cost $6.00 each. The dance tickets are now on sale at $1.10 per person. It is expected that all members from our shipyard post will make this a gala affair. You might also like to know that your Congressman and your Senators will
32 be dancing along with you at the big dance. Order your tickets *now* from your shop stewards. Reserve now for the banquet on Saturday evening.

Why the Ropewalk?

The Defense Department again announced the closing of the ropewalk. They also announced the closing of other such activities throughout the country. The so-called closing to take the Government out of competition with private enterprise is just so much hooey.

If President Eisenhower was serious during his last campaign when he stated, "Federal employees have nothing to fear if I am elected", then he had better start looking into the job his subordinates are doing while he is batting the golf ball around.

The truth of the matter is that big business wants everything from rope to guns and they do not care what the overall cost is going to be for Uncle Sam. There is not one single item on the list that the Defense Department is going to close, that can be manufactured by private business at a savings to our Government. Practically every item that will be turned over to private business will and will cost the U. S. one to three times more.

Remember the FEVA Is Your Organization

Is It Flynn? Is It Cullen? Is It Howard?

Vacation in the winter time? It appears as though the confused Pipe Shop will not allow their employees to have any vacation or time off until the first snow starts to fall. Confused Cullen blames it all on the silent man (Captain Flynn) but at any rate some have blamed it on the new Shipyard Commander, Captain Howard.
33 There is one thing we do know and that is we can't blame Admiral Snyder, as he is vacationing in France.

At any rate when the hard working boys at the Pipe Shop put in and had approval for their summer vacations, they then went to the various beach resorts and placed deposits (some as high as $250.00) on cottages, etc. Just as some were to depart and just as some of our gents reached their cottages, confused Cullen had telegrams waiting for them to come back to work and then he cancelled *all* vacations for his shop throughout the summer. When asked about it, he claimed that it was Captain Flynn that ordered the cancellation of all vacations. In any event we would like to point out that our good friend Captain Flynn had his vacation. If he would put a little more time in trying to plan his production work schedule instead of trying to put the peak on everyone in the shipyard, the families of the Pipe Shop employees would not have lost the money they put down on cottages and all of them would have had a little vacation from all of the heat.

The Human Thermometer

T'was the day before Saturday and all through Boston not a creature was stirring except at the Boston Naval Shipyard. The thermometer hit the 100 mark and aboard the ships the thermometer hit a low of 120 degrees. Over at the Navy Building they called it quits at 2 o'clock and all were signed off on weather leave. At the Watertown Arsenal they tossed them out and practically all non-air-conditioned stores in Boston gave up. But not so at the Yard.

Our Commander-in-Chief Captain Howard rose from his desk in his air-conditioned room, called the dispensary and asked how many were prostrated from the heat, and then sat back and said that our champs here at the Shipyard will continue to work until 4:10 or 1610 Navy time. We do not know how many had passed out but we do hope that this is not a new type of a thermometer to use when the tropical heat starts to hit Boston.

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Inside Stuff

If Joe Mahoney goes to Washington on a new job that Admiral Cronin is trying to get for him, a party whose last name begins with M will have the inside track on the

Master Rigger's job. Captain Flynn wants "M" and you all know how that stuff works . . . Admiral Snyder paid for his and his Mrs. dinner that was tossed for them by the Masters . . . Some of the temporary help are being shifted into jobs in various sections of the Shipyard, rather than calling in Career employees from the outside (some are non-vets that do not have any status that are being taken care of) . . . Dan Healy the mystery man of 58 (it's a mystery as to what his duties are, if any) took an examination for a GS-14 in Washington . . . the Assistant Secretary of the Navy was a little bit fearing over a legal decision that was made by Neal Ellis of the Navy's Office of Industrial Relations Office. Said the Assistant Secretary after hearing of Ellis's decision, "Are you sure that he is the legal brain for OIR?" F. E. V. A. answered him and said "He has been for some time and has been giving out with some pips" . . . Potts of Public Works is retiring (Nuff said) . . . in our last issue we told how Captain Flynn's daughter was working over at the Cambridge Air Force Research Center. Well our face is red because she isn't. She is working right here in our own Boston Naval Shipyard. You guess it—she is working in her father's department (Production Department) . . . If the United States Civil Service Commission was on the ball they would start looking over some of these hirings.

100 Veterans Restored at Hingham

Over 100 veteran employees will be restored to their positions at the Hingham Naval Ammunition Depot, it was disclosed today by Kenneth T. Lyons, National Commander of the FEVA, as the result of a decision by the United States Civil Service Commission in Washington, D. C., which held that the retention of female ordnance workers at the Hingham Depot while male ordnance workers were being discharged, is illegal.

The F. E. V. A. brought suit against the Commander of the Hingham Depot during the latter part of June. Judge Bailey Aldrich had set August 16, 1955, as the date for hearing for a permanent injunction in connection with this suit.

No Dismissal Yet

The F. E. V. A. has announced, however, that they will not ask for dismissal of the suit until all of the discharged veterans have been restored to their former positions. They also have demanded that the Navy Department not only restore these veterans to their former positions, but also that they be paid back wages from the time of their illegal separation to the present date, which covers a period of approximately three months and amounts to approximately $90,000.00.

The controversy began early in 1955 when the Navy Department gave permanent status to female ordnance workers disregarding veteran ordnance workers who had been hired at the same time. The Navy Department stated that they could make the female workers permanent because of an old Federal statute. However, the officials of the F. E. V. A. claimed that the veterans should have received permanent status at the same time as the women employees under the provisions of the Veterans Preference Act.

The Commanding Officer of the Hingham Naval Ammunition Depot ordered all supervisors to read the Civil Service Commission's announcement of their decision to all of the employees. The announcement in part reads:

> "The following statement shall be read by every supervisor to his assembled workers on August 11, 1955, without fail.
>
> The U. S. Civil Service Commission which authorized the announcement of an examination for ordnance workers (female) as a result of which career status was conferred on female ordnance workers, has now determined that such authorization was in error and has directed the withdrawal of such status of the female workers. Corrective action will be taken retroactive to May 20, 1955."

Wage Survey

Following the recent announcement that the C. I. O. and Bethlehem Steel had concluded a new wage agreement calling for an increase in wages of 11 to 15 cents an hour for East Coast Shipyard Workers, F. E. V. A. officials

requested the Secretary of the Navy to immediately conduct a new comprehensive wage survey based on this contract as well as the new contracts calling for pay increases in the auto, electrical, and transportation industries. While refusing to make any positive promises—the gist of the remarks in the Secretary's office would indicate that the F. E. V. A. proposal was acceptable and would be acted upon. If however the Navy does not start the wage survey by next month F. E. V. A. has a plan in mind to force the issue, which we shall report to you at that time.

37 Promotional Policy

Last month we reported the disinclination of the Production Officer to promote either one of two Jewish employees who topped an examination. Instead, the third man, with a relatively low mark and qualifications, was promoted. At a third step grievance hearing initiated by the man who led the field, the Production Officer, Captain Flynn, refused to reveal why he would not promote the first man on the list. It is only our opinion but we feel that a forthright answer on the part of Captain Flynn would have done much to dispel the awful suspicions that have arisen as a result of this case. Captain Flynn's refusal to answer the questions put to him reminds us, in many respect of those who have refused to answer questions because of the rights enjoyed under the 5th Amendment to the Constitution. All of us can stand on our rights but an honest question deserves an honest answer.

Our Compassionate M. D.'s

The Shipyard Dispensary in keeping with the vows the good doctors made to Hippocrates, had the following comment to make recently to shipyard employees: 1—to a disabled veteran of WW II who is the victim of a foot fungus better known as "Jungle Rot", and who asked for temporary treatment, "send him back to the jungle"; 2—an apprentice, who evidently has the misfortune of being a veteran of the Korean War, recently turned in to the Shipyard Dispensary with an ailment that was diagnosed as a hernia. Six weeks previous the apprentice was examined by the same doctors, on his original employment,

and found *not* to have a hernia. When the poor apprentice requested hospitalization and compensation for his injury, the Industrial Medical Officer wanted to know "What makes you think we're going to carry the freight?"

Our only comment insofar as the Industrial Medical Officer is concerned is that he missed his calling—he would have made a fortune as a comedian!

A Veterans Organization
Paid
Boston, Mass.
Permit No. 55922

BOSTON NAVAL SHIPYARD POST NO. 1, FEDERAL EMPLOYEES VETERANS ASSOCIATION, CHARLESTOWN, MASSACHUSETTS

Extra Yard FEVA Post 1 Extra

This sheet has been inserted as a last minute "Extra" to inform F. E. V. A. members of the occurrences of August 19, 1955, the day of the great rain.

The regular four page Vet-News had already been printed and was ready for mailing, but we felt that the events of this day were too important to wait for another month to acquaint you of them.

In another story of this issue we told you of the Shipyard Commander's refusal to exercise the authority granted him by Congress to close the shipyard, on a time allowed basis, when the temperature hit 100 degrees, because as Captain Howard explained, the dispensary had no reports of heat prostrations. We wonder how much above 100 degrees the temperature has to go before Captain Howard will close the Yard? In this connection it is interesting to note that as of this writing Governor Herter has dismissed State employees on eight days this summer and we doubt if the hottest office in the State House even approached the temperatures aboard ships constructed of steel and aluminum.

At about 10:45 A. M., Friday, August 19, 1955, the F. E. V. A. officially requested Captain Howard to close the Shipyard because of the unprecedented rainfall, and the practical impossibility of men to work aboard

ships. At approximately 11:15 A. M. the Shipyard Commander replied, through the Industrial Relations Officer, that he would not close operations for the following reasons:

(1) Dismissing shipyard employees would create a transportation problem;
(2) The weather forecast indicated that the rain would stop by noon; and
(3) Employees could go home on an annual leave basis if they chose to.

F. E. V. A. then invested a whopping ten cents in a phone call to Forecast 2424 and found that the official U. S. Weather Bureau forecast at 11 A. M. was for continued heavy rain all afternoon, ending in the early evening.

During the noon hour we learned by radio that Massachusetts was experiencing the heaviest rainfall in history, that practically all roads were inundated at one point or another, and that the Commissioner of Public Safety had requested all citizens to avoid any unnecessary travel and to get off the roads and into their homes, as soon as possible.

At about 2 P. M. (1400 Navy time) the F. E. V. A. made another request to the Shipyard Commander to close Yard, pointing out the conditions and weather reports described above and also that a far more serious transportation problem would arise at 4:10 (1610 Navy time) if the hundreds of cars of shipyard employees were added to the already congested Boston traffic situation.

In the meantime, the Fire Department's electrical system was washed out, the dispensary was flooded and had to be pumped out and all major telephone connections in the shipyard went dead, all of which would have been lovely if a crisis of any sort had developed in the shipyard. For instance, how would we get an ambulance, or a fire engine, to any of the piers with the telephone connections dead?

After three more requests the Shipyard Commander finally relented and at 2:55 P. M. (1455 Navy time) he ordered shop employees dismissed at 3 P. M. (1500 Navy time) and office employees dismissed at 3:15 P. M. (1515 Navy time).

We have gone into these details because we feel you should understand the philosophy the Shipyard Commander uses in determining whether or not "climactic conditions" warrant the closing of the shipyard. We feel also that you should know of the unnecessary danger to which Captain Howard exposed every employee by refusing to close the yard earlier. And especially we are interested in wanting to know the value of legislation passed by Congress if men such as Captain Howard, given the responsibility of carrying out the law, either refuses or are reluctant to exercise their authority until a crisis is reached.

We are bringing the entire matter to the attention of the Secretary of the Navy and the Massachusetts Congressional Delegation, requesting that immediate remedial action be taken so that a similar faux pas will not occur in the future.

What Wrong With the Cafeteria? Part 2

Last month, following the announcement of an increase of 10% in prices at the Cafeteria, we commented extensively and made a few recommendations on the operation of the cafeteria. In the first place we felt that the increases were unwarranted, and, secondly, we suggested that if the Cafeteria had been operating at a loss at the prices charged, then an industrial engineering firm should be employed to survey the entire establishment, mode of operation, method of purchases, and preparation of food.

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Since the last issue of the Vet-News we have discussed the Cafeteria, its menus, and prices with a number of professional industrial caterers. The consensus of opinion was that there was something very wrong if a loss occurred at the prices charged. Let's just take one item, coffee. The cost of coffee in the Shipyard is 10 cents a cup. Our catering friends tell us that a cup of coffee can be broken down as follows: using the best brand of coffee and high butterfat content cream, 1 and ¼ cents for cream and sugar, and 1½ cents for the paper cup, for a total cost of 4 cents. Being generous, we are ready to place the average cost of a cup of coffee 20% higher, or 5 cents per cup to produce . . . this leaves a net profit of 5 cents per cup sold. The Cafeteria is now selling an average of 13,000 cups of coffee

per day, which means an annual profit of $169,000 per year on coffee alone. Not to mention the profits realized on doughnuts, pastries, milk and sundries. As one man suggested, you could almost give the hot meals away and still make money. It is senseless for the Shipyard management to insist on burying its head in the sand and refuse to take cognizance of the fact that there is something radically wrong here. We demand, in fairness to the people who buy 260,000 cups of coffee a year, that an independent industrial engineering firm survey the operation of the Cafeteria, with a report containing findings and recommendations that will be made available to all shipyard employees. If there is any possible logical reason for refusing such a demand, we are sure that all hands would be interested in hearing it.

!... Sign a New Member Into F. E. V. A. This Month ... !

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42 **Minute Entry of Argument—November 5, 1957**

(omitted in printing)

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43 IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5263.

KENNETH T. LYONS ET AL., *Plaintiffs, Appellants,*

v.

W. E. HOWARD, JR., *Defendant, Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alfred Sigel, with whom *Irving Kaplan* was on brief, for appellants.

Paul A. Sweeney, Attorney, Department of Justice, with whom *George Cochran Doub*, Assistant Attorney Gen-

eral, *Bernard Cedarbaum*, Attorney, Department of Justice, *Anthony Julian*, United States Attorney, and *Andrew A. Caffrey*, Assistant U. S. Attorney, were on brief, for appellee.

Opinion of the Court—January 13, 1958

MAGRUDER, *Chief Judge*. We have before us an appeal by two plaintiffs, citizens of Massachusetts, from a summary judgment for defendant, a citizen of Maryland, under a complaint for libel.

The defendant is Rear Admiral W. E. Howard, Jr., Commander of the Boston Naval Shipyard. It appears that defendant, as commander of the shipyard, had become increasingly irritated by the conduct of a labor organization called Boston Naval Shipyard Post No. 1. The parent national organization of this local is the Federal Employees Veterans Association, Inc., of which plaintiff Kenneth T. Lyons, who works at the Boston Shipyard, is National Commander. The other plaintiff, Joseph S. McAteer, also alleged to be an employee of the shipyard, is Commander of Boston Naval Shipyard Post No. 1.

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Plaintiffs charge that they are entitled to recover damages for defamatory matter contained in a letter written by defendant on September 8, 1955, addressed to the Chief of the Bureau of Ships, Department of the Navy, Washington, D.C., and also to the Chief of Industrial Relations, Office of Industrial Relations, Department of the Navy. In this letter defendant undertook to explain to his superiors why he had determined to withdraw recognition, as of September 9, 1955, from "Post No. 1, Federal Employees Veterans Association, Inc., as an organized employee group in the Boston Naval Shipyard".

This letter alleged that plaintiff Lyons by name, and the other plaintiff by description, "exercise a predominant influence" in the organizational activities; that the organization has been giving wide distribution to a newsletter or bulletin; that this bulletin has become more and more unfairly critical of the shipyard administration, for the purpose of not only thwarting the aims of the shipyard administration in the accomplishment of its mission, but also to further personal aims and self-interests of the individuals

in control of the labor organization; that these "editorial expletives" have adversely affected the general morale of employees of the shipyard, who are entitled to be protected against such "overt subversion" by any labor group "whose methods and whose motives are unethical, uninhibited, and lack the integrity of pupose that could reasonably be expected."

The complaint charges that the intent and meaning of the defendant's foregoing letter was to charge that each of the plaintiffs was false to his trust as an officer of the said organization, in engaging in subversive activities directed to the end of obstructing the legitimate purposes of the labor organization and of the shipyard management; that the statements contained in defendant's letter were as a whole written maliciously, wickedly, recklessly, willfully and falsely.

The summary judgment for defendant was based upon a ruling of law that the undoubtedly defamatory statements attributed to the defendant, as commanding officer of the Boston Naval Shipyard, were published by him in the discharge of his official duties, in relation to matters committed to him for determination; and that in respect thereto the defendant was completely and absolutely immune from civil liability, regardless of motive.

There are three possible publications charged in the complaint: (1) The official letter or memorandum to the defendant's superior officers, notifying them of the action taken by him in withdrawing recognition of the employee group at the Naval Shipyard; (2) the communication by defendant to each member of Congress from Massachusetts of copies of this official memorandum or report; (3) the communication by defendant to the United Press, the Associated Press, the International News Service; and to all of the daily papers in the city of Boston, of copies of the aforesaid official report.

As to publication (1) above, it appears from the uncontradicted affidavit of Rear Admiral Snackenberg, Commandant of the First Naval District, and defendant's immediate military superior, that among Rear Admiral Howard's official duties was "the making of reports to the Bureau of Ships, United States Navy, relative to any significant action taken by him with respect to the per-

sonnel, civilian or military, employed or stationed at the Boston Naval Shipyard." In deference to the decided cases, we feel obliged to hold, so far as this official report is concerned, that the defendant is protected by an absolute immunity from civil liability. *United States* v. *Brunswick*, 69 F.2d 383 (C.A.D.C. 1934); *De Arnaud* v. *Ainsworth*, 24 App. D.C. 167 (1904); *Farr* v. *Valentine*, 38 App. D.C. 413 (1912); *Taylor* v. *Glotfelty*, 201 F.2d 51 (C.A. 6th, 1952); *Miles* v. *McGrath*, 4 F. Supp. 603 (D.Md. 1933); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D.Ky. 1938). See also *Gregoire* v. *Biddle*, 177 F.2d 579 (C.A. 2d, 1949), cert. denied 339 U.S. 949 (1950); *Papagianakis* v. *The Samos*, 186 F.2d 257 (C.A. 4th, 1950).

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Of course the policy behind the granting of such absolute immunity is not to protect wicked defendants from the normal civil liabilities for the publication of defamatory statements maliciously and in bad faith. Rather, the policy is to further what is deemed to be the greater public interest of assuring to conscientious public officials complete freedom in the exercise of their duties, without the inhibiting fear of possible lawsuits in which they would have to satisfy a jury of their own good faith.

Whether the courts may perhaps have gone too far down the line in developing this doctrine of absolute immunity may be a fair question; at any rate we shall not be astute to develop further the categories of absolute immunity.

We shall now say a word about publication (3) above set forth, namely, distribution of copies of the official report to various representatives of the press. We understand that counsel for appellants abandoned this point on appeal. The record contains an unchallenged affidavit by the defendant in support of his motion for summary judgment stating that he "did not release or cause to be released any document or communication . . . to any representative of the press." It appears from the affidavit of Admiral Snackenberg that the office of the Commandant of the First Naval District makes it a practice of releasing pertinent information to the press; that during his official absence "the then acting Commandant, First Naval District, Captain John A. Glick, U. S. Navy, authorized the routine release, through the Public Information Officer of Headquarters, First Naval District," to repre-

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sentatives of the press of copies of the official memorandum from the Commander of the Boston Naval Shipyard to the Chief of the Bureau of Ships in Washington, D.C. Thus, when the defendant forwarded through channels his official report, he might well have foreseen that copies of such report would surely be released to the press by higher authority. But if Admiral Howard was protected by an absolute immunity in making such official report, it seems to us obvious that he would not lose that immunity by reason of the fact that a higher authority, over whom he had no control, would undoubtedly release to the press a copy of the official communication.

That leaves for consideration the second publication mentioned above. In this respect the defendant's affidavit conceded that in the course of his official duties "and in conformance with Navy Department policy of keeping members of Congress informed of matters in which they have an official interest," he sent copies of his official memorandum to each of the members of the Massachusetts congressional delegation. It is true that these members of Congress did have an official interest in being kept advised of important developments in labor relations at the Boston Naval Shipyard. It is therefore understandable and certainly not officious that the Commander of the Boston Naval Shipyard might have conceived it to be a proper exercise of his official functions to see to it that the members of Congress should receive copies of such official report, especially as this report was in a sense an answer to charges of maladministration at the Naval Shipyard contained in the newsletters or bulletins of the Boston Naval Shipyard Post No. 1, which the plaintiffs themselves had taken pains to supply to the members of Congress from time to time. Therefore, in making this communication to the members of Congress in the course of the per-
48 formance of his executive functions, we think that the defendant ought to be protected by a qualified or conditional privilege so far as concerns liability for matters of defamation which may be contained therein. See Am. L. Inst., Restatement of Torts § 599 *et seq.* It would be an unwholesome thing to extend to this situation the protection of an absolute immunity such as has been held to apply to official reports to a superior officer.

The protection of judicial officers from the fear of civil lawsuits has been a matter of special concern to the courts. See *Bradley* v. *Fisher*, 13 Wall. 335 (U.S. 1871). There is no doubt that a judge is absolutely immune from civil liability on account of defamatory matters included by him in a judicial opinion which is officially released. Yet the Court of Appeals of New York, in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257 (1943), held that such absolute immunity did not protect a judge in furnishing a copy of his judicial opinion to the West Publishing Company for publication in a series of unofficial reports. The case illustrates the tendency of the courts narrowly to confine the doctrine of absolute immunity. The position of the Commandant of the First Naval District is certainly no stronger than was that of the judge who was a defendant in *Murray* v. *Brancato*.

We may add that we have some question whether the present case is to be governed by the law of Massachusetts, as declared in the state courts, or whether this is a case where legal relations are governed by a "federal common law," a body of decisional law developed by the federal courts untrammeled by state court decisions. Cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F.2d 539 (C.A. 1st, 1940). It would be difficult to challenge the constitutionality of an act of Congress prescribing an absolute immunity from civil liability, or a conditional privilege, in the case of official reports made by a naval officer to his
49 superiors. In the absence of a prescription by the Congress, is it not a function of the federal courts to formulate the rules of liability applicable to official actions by civilian or military officers of the United States, regardless of what the state courts might say? Cf. *United States* v. *Standard Oil Company of California*, 332 U.S. 301 (1947). We pose this question without undertaking to decide it, for we think it would make no difference in the proper disposition of the present case. The complaint here was founded on diversity of citizenship. However, counsel for the parties seem to have presented the case as one of general common law, not confining themselves to the law of any particular jurisdiction. Even if Massachusetts law is controlling, we have no reason to suppose that it would extend the doctrine of absolute immunity to cover defendant's publica-

tion to the members of the Congress. As recognized by the Supreme Judicial Court in *Howland* v. *Flood*, 160 Mass. 509, 516 (1894): "There are comparatively few cases in which parties are protected absolutely from liability for statements which turn out to be defamatory."

A judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for further proceedings not inconsistent with this opinion. No costs on appeal.

WOODBURY, *Circuit Judge*, (dissenting in part). The question is close and authority bearing directly upon it appears to be lacking, but under the circumstances of this particular case I would equate the defendant's communication to the members of the Massachusetts congressional delegation to his communication to his superior officers. I certainly would not go so far as to say that one in the defendant's position always enjoys an absolute immunity from civil liability for defamatory statements in communications addressed to members of Congress. But I would say that there is absolute immunity when, as here, the communication to members of Congress is not gratuitous or officious but is made in accordance with the established departmental policy and practice of keeping member of Congress informed of matters in which they have an official interest, and certainly they have an official interest in matters affecting labor relations at military installations in their districts.

I do not think it would be unwholesome to extend the protection of an absolute immunity to the situation before us. On the contrary, it seems to me that beneficial results might well be expected from a rule giving absolute protection to military officers not only with respect to their communications to their superiors, but also with respect to copies of those communications sent to members of Congress, when the subject matter thereof is pertinent to their legislative duties and functions.

I would say that Congress can be assured of receiving a free flow of unwatered down information of the kind it needs wisely to exercise its legislative supervision over the military establishment only if military officers like the defendant are free from the restraints naturally flowing

from the fear of a lawsuit in which they might or might not succeed in convincing the trier of fact of their good faith. I see no occasion to anticipate that the rule I advocate would work undue hardship on persons defamed. The congressional audience is small and we ought to assume that no member of that body would be a party to the dissemination of calumny. As far as sanctions are concerned, it seems to me that fear of military discipline, perhaps at the instigation of a member of Congress outraged at the libel of a constituent, provides an adequate deterrent. I would affirm the District Court.

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51 IN UNITED STATES COURT OF APPEALS

Judgment—January 13, 1958

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day; no costs on appeal.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Thereafter, on January 21, 1958, mandate was stayed until further order of Court.

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52 Clerk's Certificate to foregoing transcript omitted in printing

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53 SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

(Title omitted)

Order Extending Time to File Petition for Writ of Certiorari—April 9, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including April 28, 1958.

Felix Frankfurter

Felix Frankfurter
Associate Justice of the Supreme Court of the United States

Dated this 9th day of April, 1958.

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54 SUPREME COURT OF THE UNITED STATES

No. 956, October Term, 1957

W. E. Howard, Jr., *Petitioner*,

vs.

Kenneth T. Lyons and Joseph S. McAteer

Order Allowing Certiorari—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.